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BONG SING SENG v. PP

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
SUPANG LIAN JCA
CHE MOHD RUZIMA GHAZALI JCA
B [CRIMINAL APPEAL NO: S-05(M)-8-01-2018]
29 JUNE 2023

Abstract – *In drug-trafficking cases, the trial court must inform the accused person of the nature of the charge against him and this includes whether the accused person is being tried for actual trafficking or presumed trafficking. If the accused is being tried for presumed trafficking, the court must identify the specific presumption that is being used. The failure to do so may result in a miscarriage of justice.*

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CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused person arrested at airport for carrying 3,697g of methamphetamine – Accused person found guilty, convicted as per charge and sentenced to death – Whether trial judge erred in not indicating at prima facie ruling whether it was case of presumed trafficking or actual trafficking – Whether trial judge erred in not invoking presumption under s. 37(d) of Dangerous Drugs Act 1952 – Whether conviction and sentence safe*

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The police had a led a raid at the Tawau Airport, Sabah upon receiving a certain information that a drug-trafficking activity would take place there. The appellant, who arrived from Kuala Lumpur and fitted the description given by the informer, was spotted collecting a black bag and a box from the conveyor belt. As he pushed his trolley and advanced towards the exit, the appellant was stopped by the police and his luggage was inspected. Crystallised substances, suspected to be drugs, were found packed inside the box. These substances were later confirmed by the chemist to be 3,697g of methamphetamine. The appellant was charged at the High Court with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Satisfied that the prosecution had established a *prima facie* case, the trial judge proceeded to call the appellant to enter his defence. In his defence, the appellant submitted that: (i) he came to Tawau to look for a job and brought along with him, among others, a box containing his tools; (ii) he did not know what happened to his tool box as the box containing the drugs was not his; and (iii) he had told the police about his box and that he had yet to collect it but was unsure as to whether the police had acted upon his information. At the conclusion of the defence's case, the trial judge found that the appellant failed to raise a reasonable doubt as to the possession of the drugs and to rebut the statutory presumption of trafficking. The appellant was found guilty, convicted as per the charge and sentenced to death. Hence, the

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present appeal. In support of his appeal, the appellant submitted that the trial judge erred in, *inter alia*, (i) not make a finding, at the conclusion of the prosecution's case, on whether it was a case of actual trafficking or presumed trafficking. There was also no indication at the *prima facie* ruling on whether the defence was called based on actual trafficking or presumed trafficking; and (ii) invoking the presumption under s. 37(d) of the DDA in finding the element of knowledge. Instead, the trial judge made an inference of knowledge based on the manner the drugs were packed, that the appellant retrieved the box from the conveyor belt and that it was flown from Kuala Lumpur.

Held (allowing appeal)
Per Supang Lian JCA delivering the judgment of the court:

(1) The trial judge had to make himself clear when calling the accused to enter his defence given that there were two separate burdens expected from him. Although it may not be incumbent for a court to set out its reasons for deciding to call on an accused to enter upon his defence in a drug-trafficking case, it was nonetheless necessary for the trial court to make a finding intimating to the defence if he had to answer a case of actual trafficking or presumed trafficking and, if the latter be the case, to identify the precise presumption. The omission by the trial judge to indicate, at the *prima facie* ruling, whether the defence was called on direct trafficking or presumed trafficking, had occasioned a miscarriage of justice rendering the conviction for trafficking to be unsafe. (paras 43 & 48)

(2) The trial judge had drawn an inference of knowledge, on the part of the appellant, pertaining to the drugs in the box, based on the manner the drugs were packed which was not easily visible to anyone and the fact that it was the appellant himself who had retrieved the box from the conveyor belt after taking a flight from Kuala Lumpur. The drawing of such inference was not manifestly unwarranted in the face of the evidence adduced at the trial. The trial judge had properly directed himself on the law and had not erred in coming to the finding that *prima facie*, the appellant had possession of the drugs independent of the statutory presumption under s. 37(d) of the DDA. The appellant failed to cast a reasonable doubt in the prosecution's case that he had possession of the dangerous drugs. The offence of possession of the drugs had been established by the prosecution beyond reasonable doubt. (paras 51, 52, 60 & 61)

(3) The order of conviction on the trafficking charge by the High Court was set aside and substituted with a conviction for an offence of possession of dangerous drugs under s. 12(2), punishable under s. 39A(2), of the DDA. The appellant was sentenced to 20 years' imprisonment and whipping of ten strokes. (paras 4 & 64)

Case(s) referred to:
Caniete Robelyn Mastelero lwn. PP [2019] 1 LNS 397 CA ***(refd)***
Fakhrurrazi Hassan v. PP [2017] 2 CLJ 125 FC ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(dist)***
Low Song Kim v. PP (Case No: 05(M)-227-10-2019(P)) (Unreported) **(refd)**
Masih Perviaz (W/Pakistan) v. PP [2022] 3 CLJ 230 CA ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Herlina Purnama Sari [2016] 1 LNS 1855 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC ***(refd)***
Roman Zolotarov v. PP [2020] 1 LNS 764 CA ***(refd)***
Rozman Ibrahim v. PP (Case No: 05(M)-205-09-2019(B) (Unreported) ***(refd)***
Seydealireza Seyedhedayatollah Ehteshamiardestani v. PP [2014] 4 CLJ 406 CA ***(refd)***
Teh Hock Leong v. PP [2008] 4 CLJ 764 CA ***(refd)***
Thitapha Charoenchuea lwn. PP [2017] 1 CLJ 1 FC ***(refd)***
Ugonna Philip Nwankwo v. PP [2016] 2 CLJ 247 CA ***(refd)***
Zulfikar Mustaffah v. PP [2001] 1 SLR 633 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (da), 39A(2), 39B(1)(a), 39B(2)

For prosecution - Mohd Fairuz Johari; DPP
For the appellant/accused - Hisyam Teh Poh Teik & Abdul Gani Zelika; M/s Johari, Zelika & Amin

Reported by Najib Tamby

JUDGMENT

Supang Lian JCA:

Introduction

[1] The appellant, Bong Sing Seng, was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act" or "DDA") for trafficking in 3,617.9 gram of methamphetamine, which is punishable under s. 39B(2) of the Act.

[2] After a full trial in the High Court, the appellant was convicted of the offence as charged and sentenced to mandatory death.

[3] Being dissatisfied with the judgment of the High Court, the appellant appealed against both conviction and sentence.

[4] We heard and allowed the appeal and set aside the conviction and sentence for trafficking and substituted it with a conviction for possession of dangerous drugs under s. 12(2) and punishable under s. 39A(2) of the Act. The appellant was accordingly sentenced to twenty years imprisonment from the date of arrest and whipping often strokes.

[5] The reasons for our decision are set out below.

The Charge

[6] The charge against the appellant reads:

> Bahawa kamu pada 16hb Jun 2016 jam lebih kurang 7.45 petang, bertempat di Balai Polis Lapangan Terbang Tawau, di dalam daerah Tawau, di dalam negeri Sabah, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 3,697.9 gram, oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39(B)(2) Akta yang sama.

At The High Court

Case For The Prosecution

[7] The prosecution's case is that on 16 June 2016, ASP Ederian bin Masaat (PW1) led a police party consisting of ten other police officers in a raid at Tawau Airport. Prior to the operation, PW1 received information that one Chinese man would be bringing drugs into Tawau using an AirAsia flight from Kuala Lumpur. PW1 and his team proceeded to the Tawau Airport. He stationed his men at various locations at the airport. At about 7pm the same day, an AirAsia flight AK5740 from Kuala Lumpur landed at the airport.

[8] The Chinese man that fits the description of the man in the information received, later identified as the appellant, was seen among the passengers at the immigration counter. The appellant then proceeded to the carousel. He had a backpack and a waist pouch with him. He took a trolley and went to the conveyor belt. After a while, the appellant was seen collecting a black bag with wheels and a box and placed them on the trolley. He then pushed the trolley and walked towards the exit door. At this point in time, PW1 moved in and stopped the appellant. The appellant was handcuffed and, together with the black bag with wheels ("black bag") and the box on the trolley, was brought to Balai Polis Lapangan Terbang Tawau.

[9] PW1 and his men then conducted an inspection of the luggage of the appellant. They found the box (exh. P27) to be wrapped with a transparent plastic wrapper (exh. P32) and the prominent word on the box was "Chemicare". Inside the box was a bag printed with the words "Kung Fu Panda". Also found in the box was another box (exh. P29(a)) wrapped in white wrapping paper printed with a picture of dinosaurs (exh. P29). Inside the Kung Fu Panda bag was one green bag with the words "Arnold Palmer" written on it (exh. P28(b)) which was wrapped in a coloured wrapping paper (exh. P28(a)). Inside the green Arnold Palmer 10 bag (P28(b)) were three transparent plastic packages (exh. P28(c), P28(d) and P28(e) respectively) containing crystallised substances suspected to be drugs. Upon opening the box exh. P29(a) which was earlier found in the 'Chemicare' box, PW1 found

A one blue bag (exh. P29(b)) containing two transparent plastic packages (exh. P29(c) and P29 is (d) respectively) which contained clear crystallised substances suspected to be drugs.

[10] PW1 seized the crystallised substances and the other exhibits and brought them together with the appellant to the Tawau Police Station at 8pm B for further investigation. At the station, PW1 did the markings of the seized exhibits and prepared a seizure list and a handing over note for the investigating officer.

[11] The next day on 17 June 2017, the appellant together with the seized C exhibits, were handed over to the investigating officer Inspector Syed Muhammad Iqbal bin Syed Yassin (PW2). On 20 June 2017, PW2 brought the exhibits to the police exhibit store where one Sergeant Jahaluddin bin Jambangan (PW4) received them and registered them in the record book (exh. P33(S)). On 21 June 2017, PW2 brought the crystallised substances and the other exhibits seized from the appellant to the chemistry department in D Kota Kinabalu. The crystallised substances were analysed by the Government chemist Biling anak Peter Raig (PW3) to contain 3,697.9 grams of methamphetamine. This then formed the subject matter of the charge against the appellant.

[12] At the close of the case for the prosecution, the learned trial judge E ruled that a *prima facie* case has been established based on the following findings as set out in the grounds of judgment:

(i) from the evidence of PW1, it is proven that the appellant was the one who retrieved the box and the black suitcase with wheels from the F conveyor belt. He placed them on the trolley before pushing it towards the exit door. He was stopped by the police when he was about to leave the departure hall together with his luggage including the box (exh. 27) where the drugs were later found;

(ii) PW1 also found the luggage tags (exh. P6(a)) and exh. P6(c)) and the G boarding pass (exh. P6(b)) that was crumpled by the appellant. It is common knowledge that the luggage tag was issued by the airline personnel when a passenger presented his or her luggage upon checking in. It bears the particulars of the passenger and serves as an identification tag to enable the passenger to identify his baggage for H collection at his destination. It is also common knowledge that the luggage tag will be issued after the airline personnel had keyed in the particulars of the passenger into the computer;

(iii) from PW1 evidence supported by the CCTV recording, the appellant had indeed taken the box (and the black suitcase with wheel) from the I conveyor belt. PW1 had been observing the appellant at all times while he was standing next to the conveyor belt;

(iv) in this case, the drugs were carefully packed in transparent plastic packages. Three of these plastic packages were kept in the green bag (P28(b)) whereas two plastic packages were found in the blue bag (exh. P29(b)) nicely placed in a box (exh. P29(a)). All these items were packed inside the "Chemicare" box (exh. P27) which was wrapped with a transparent plastic wrapper. The drugs were wrapped and packed in such a way that it is not easily visible to anyone. This, coupled with the fact that it was the appellant who had retrieved the box (P27) as well as the black bag from the conveyor belt, and that he had flown in from Kuala Lumpur, show that the appellant knew about the drugs found;

(v) PW4 had explained the discrepancy in his evidence whether the box (exh. P27) which contained the drugs and received by him, was already sealed in a box together with exh. P35(a)(i) and 35(a)(ii) or not. PW4 clarified that the box (exh. P27) and other exhibits were separately placed in a box, and exh. P27 was already sealed when he received it from PW2. PW4 had cleared any doubt with regard to the condition of exh. P27 *ie*, it was sealed when PW2 sent them for registration at the exhibit store. He clarified that when he first testified that PW2 had passed to him the exhibits which were already sealed in a box, he was in fact referring to exh. P27, which was already sealed;

(vi) the existence of the two police reports is not fatal to the prosecution's case. Despite the fact that the defence had tendered the earlier report by PW1 (exh. D1), there is no contradiction in these two reports with the evidence of PW1;

(vii) the court was satisfied that the drugs were in the custody of PW1 from the time it was seized from the appellant until the time when it was handed over to PW2;

(viii) PW3 had homogenized all the crystalised substances from the five transparent plastic packages before taking seven representative samples weighing 0.1087 grams for quantitative test. Thus, the court was satisfied that the evidence of PW3 is credible to show that the drugs in question was methamphetamine weighing 3,697.9 grams; and

(ix) in the instant case, it is proven that the accused was in possession of 3,697.9 grams of methamphetamine.

[13] Having found that the prosecution had established a *prima facie* case on the charge preferred, the trial judge called upon the appellant to enter upon his defence. The appellant chose to testify under oath.

The Appellant's Defence

[14] The defence of the appellant is briefly that:

A (i) he came to Tawau to look for a job. According to him, he brought along with him a backpack, a suitcase on wheels, a waist pouch and a box containing his tools;

(ii) he denied pushing the trolley himself from the conveyor belt and he did not know what happened to his tool box;

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(iii) according to him exh. P27 was not his. While at the airport police station, the appellant claimed that he was assaulted by the police. He told the court that he was asked to squat at one corner of the airport police station and did not witness the police checking the box; and

C (iv) he claimed that he had told the police about the box he actually brought from Kuala Lumpur and that he had yet to collect it. However, he was not sure whether the police had acted on his information.

[15] In respect of the defence of the appellant, the learned trial judge found as follows:

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(i) the appellant's defence is an afterthought, it was never put to the prosecution's witnesses during the prosecution's case the fact that he was carrying a tool box and the purpose of him coming to Tawau;

(ii) the court is of the opinion that the appellant had made up the story on

E his purpose of going to Tawau. There is no evidence to show that he knew anyone in Tawau. He was a stranger there;

(iii) the appellant's version that he had not taken the box from the conveyor belt is hard to believe. It would not make any sense if the police, who have received information about the appellant's movement would act

F without first being satisfied that he had taken all his luggage before taking any action; and

(iv) the appellant's evidence was mainly a bare denial.

Decision At The Close Of The Defence Case

G **[16]** At the dose of the defence case, the learned trial judge found that the appellant had failed to raise a reasonable doubt as to possession of the drugs as stated in the charge and also failed to rebut the statutory presumption of trafficking. He thus found the appellant guilty as charged, convicted him and imposed the mandatory death sentence.

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The Appeal

[17] Before us, Mr Hisyam Teh Poh Teik, learned counsel for the appellant, canvassed three broad grounds and they are that the learned trial judge:

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(i) erred when His Lordship did not indicate at the *prima facie* ruling whether it was a case of presumed trafficking or actual trafficking; A

(ii) erred when he did not invoke the presumption under s. 37(d) of the Act; and

(iii) erred in invoking the presumption under s. 37(da) of the Act when the pre-requisites for invoking it had not been satisfied. B

Appellant Counsel's Submissions

[18] In respect of the first ground, this is taken as a point of law. Counsel for the appellant submitted that the trial judge did not make a finding, at the conclusion of the case for the prosecution, whether it was a case of actual trafficking (direct trafficking) or presumed trafficking. The complaint is that the trial judge did not indicate or intimate to the appellant at the *prima facie* ruling whether the defence was called based on actual trafficking (direct trafficking) or presumed trafficking. According to counsel, this is borne out in the notes of proceedings in the High Court at p. 157 AR Vol. 2A, which we have taken the liberty to reproduce below: C D

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TWU-45A-1/1-2017 PP vs. Bon

Monday, 30 October 2017 @ 10.11am E

For Public Prosecutor: DPP Khairunnizam bin Ideris

For the Accused: Mr. Flamid Piamzah bin Mydin
Messrs Amin Jaafar & Co.
(Appointed Counsel)

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Accused: Present

DPP: Today is fixed for decision.

Court: Decision delivered.
Prosecution has proved prima facie case and I call the witness to enter his defence.
3 choices explained to Accused in Mandarin. G

Interpreter: Accused understand the 3 choices. Accused elected to give sworn evidence from the witness dock.

DC: Pray for 10 minutes stand down.

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Court: Stand down for 10 minutes.

[19] Counsel contended that this is important because the burdens imposed on the appellant are completely different. As there are two separate burdens expected of the appellant, the trial judge had to make himself clear.

[20] Premised on this, counsel contended that the omission had prejudiced the appellant as he would not know whether he would have to raise a reasonable doubt or to rebut the presumption on a balance of probabilities. I

In this regard, counsel relied on the decision in *Thitapha Charoenchuea lwn. PP* [2017] 1 CLJ 1 at [28] where the Federal Court advised trial judges to write grounds at the *prima facie* stage and the later Federal Court decision of *Caniete Robelyn Mastelero lwn. PP* [2019] 1 LNS 397 where the conviction for trafficking was set aside based on this ground alone.

[21] Learned counsel thus urged us to set aside the conviction for trafficking based on this ground alone.

[22] The second ground of appeal is that the trial judge erred when he did not invoke the presumption under s. 37(d) of the Act in finding the element of knowledge. Instead, the trial judge made an inference of knowledge based on the manner the drugs were packed, that the appellant retrieved the box from the conveyor belt and that it was flown from Kuala Lumpur.

[23] Counsel submitted that the inference of knowledge based on the factors stated above was misconceived. The trial judge ought to have considered the following factors:

(i) that there was no forensic evidence like DNA or fingerprints to connect the transparent plastic packages which contained the drugs with the appellant;

(ii) there was no evidence that it was the appellant who packed the box and its contents. The factual matrix could lead to an inference that the appellant was an innocent carrier, carrying the box for someone else;

(iii) there was no adverse conduct displayed by the appellant that could lead to an inference of knowledge;

(iv) the principles laid down in *Fakhrurrazi Hassan v. PP* [2017] 2 CLJ 125 as follows:

> [16] ... In our view, accessibility and opportunity to inspect may be a very material consideration in the determination of the physical element of custody and control. When someone is caught carrying a bag containing package of dangerous drugs, the element of accessibility to the thing and the opportunity to inspect is invariably established because of his proximity to the bag and the packages. However, in the absence of additional evidence, for example of him taking a peek at the drugs, it does not necessarily mean that he must have knowledge of the drugs, unless there is a presumption in the law to warrant knowledge to be presumed, and indeed in our view, this is where the presumption under s. 37(d) of the Act may be called into play to presume knowledge of the nature of the thing in the bag. In our view, in the circumstances of this case, accessibility and opportunity to inspect alone are not sufficient to inevitably lead to the inference of knowledge on the part of the appellant. We therefore find that with the evidence of conduct being ruled out by the learned trial judge, there was insufficient factual matrix for her to make the inference of

> knowledge on the part of the appellant. On the proven facts and circumstances of this case, the prosecution has only proven that the appellant had custody and control of the bag and package containing the proscribed drugs, activating the presumption of possession and knowledge of the nature of the dangerous drugs under s. 37(d) of the Act. Since s. 37(d) has been invoked, s. 37(da) could no longer be relied upon to prove trafficking. The learned trial judge could only have called upon the appellant to enter his defence for an offence of possession of the drugs under s. 6 and punishable under s. 39A(2) of the Act.

[24] It was contended by counsel that since the primary facts in the present appeal are similar to that of *Fakhrurrazi Hassan* (*supra*) in the following aspects:

(i) that both the accused persons had physical custody and control; and

(ii) that in respect of both the cases there were no adverse conduct, for instance, fear or flight,

the decision in *Fakhrurrazi Hassan* should be followed.

[25] Reference was also made by counsel to the decision of *PP v. Tan Tatt Eek* [2005] 4 CLJ 460. In that case, the accused was caught holding a plastic packet containing drugs and upon confronted by the police, he expressed shock and dropped the plastic bag. The Federal Court affirmed the position taken by the Court of Appeal in invoking the knowledge presumption under s. 37(d) of the Act. This is what the Federal Court said at p. 465 of the report:

> In our view, the Court of Appeal was right in holding that there was no factual matrix adduced by the prosecution to infer that the respondent had knowledge of the nature of the drugs in the bag. On the evidence, the learned trial judge erred in finding that the respondent had knowledge of the drugs by way of inferences and from the circumstances of the case.

[26] Thus, said counsel for the appellant, the trial judge erred in not invoking the s. 37(d) presumption at the *prima facie* stage. The trafficking conviction therefore cannot be sustained and ought to be substituted with one of possession.

[27] With regard the third ground, it was argued for the appellant that the trial judge erred in invoking the trafficking presumption under s. 37(da) of the Act. That presumption, said counsel, is invoked when there is no evidence of trafficking. In the instant appeal, there is evidence of 'transporting' or 'carrying' under s. 2 of the Act. When there is direct evidence, the law does not allow the presumption to be invoked. The approach of the trial court had prejudiced the appellant in that he had to rebut the same based on a higher standard.

[28] Counsel relied on *PP v. Chia Leong Foo* [2000] 4 CLJ 649 where the High Court observed:

> Presumptions are therefore restricted in their operation to instances where there is evidence only of the basic facts. The limitation on the use of the presumption provisions in the face of available evidence can be discerned if the ramifications of their use in such circumstances are considered. It must first be observed that reliance on the presumption provisions where there is available evidence of the facts to be presumed will be unfavourable to the accused. This is because where the court relies on a statutory provision relating to a presumption of law like the presumption provisions it is bound to take the fact as proved until evidence to the contrary is given, on a balance of probabilities, to disprove it (see *PP v. Yuvaraj* [1969] 2 MLJ 89; *Nagappan Kuppusamy v. PP* [1988] 2 MLJ 53). This results in a legal burden being imposed on an accused person though it is not illegal. Failure to discharge the burden, even where a reasonable doubt as to guilt exists, will be followed by conviction (see *State v. Mello & Anor* [1999] 1 LRC 215). However, if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. Thus indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed. Arbitrary use of the presumption provisions, without any fixed guidelines, when there is direct evidence of the facts to be presumed may also prejudice the accused in another way. When the presumption provisions are invoked in one case and not in another although there is direct evidence of the facts to be presumed in both instances there may be a violation of art. 8(1) of the Federal Constitution which guarantees equal protection of the law.

[29] According to counsel, *Chia Leong Foo* is still good law.

Our Decision

Whether The Trial Judge Had Erred In Not Indicating At The Prima Facie Ruling Whether It Was A Case Of Presumed Trafficking Or Actual Trafficking

[30] It is expedient to first dispose of this first ground raised by counsel.

[31] In answer to the appellant's contention on this point, the prosecution submitted that there is no duty for the trial judge to state his reasons for calling the appellant to enter his defence as long as the trial judge had evaluated and considered all the evidence adduced. In this case, after doing so, the trial judge was satisfied that a *prima facie* case against the appellant had been made out at that stage. The prosecution relied on the case of *Junaidi Abdullah v. PP* [1993] 4 CLJ 201 where the Supreme Court held that:

> There is no statutory provision requiring a Judge sitting alone to expressly record his reason before calling the Accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. Mere failure or omission on the part of a trial Judge to record his grounds for calling for the defence or to record his findings on credibility of witnesses at that stage of the trial is not sufficient by itself for allowing an appeal, particularly when considered in the light of the provisions of ss. 60 and 72 of the Courts of Judicature Act 1964 read together with s. 167 of the Evidence Act 1950 and s. 422 of the Criminal Procedure Code.

[32] The prosecution further argued that the appellant was well aware of the prosecution's stand in proving the case against him as the prosecution in their opening speech as well as during oral submissions, had stated that they relied on the presumption of trafficking.

[33] We have perused the records of appeal, in particular the notes of proceedings in the High Court at the conclusion of the prosecution's case as noted in para. [18] above, and found that the trial judge had indeed omitted to indicate to the appellant (accused) at the *prima facie* ruling whether the appellant had committed any of the acts that constituted trafficking as defined in s. 2 of the Act, which would make it actual trafficking or direct trafficking. Neither did the trial judge indicate to the is appellant that he was relying on the presumption of trafficking.

[34] In this regard, we are of the view that the decision in *Junaidi* (*supra*) can be distinguished as it is not a case of drug trafficking where the burden of proof on the part of the accused is not always the standard burden of raising a reasonable doubt. In *Junaidi*, the accused was charged with being in possession of a revolver without lawful excuse and upon a *prima facie* ruling having been made, the burden of proof placed on the accused for this type of case is the standard one of raising a reasonable doubt. Whereas in drug trafficking cases, the trial judge ought to make the necessary finding *ie*, whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence adduced. If the trial judge invokes the presumption, it would mean that the burden placed on the accused would be the higher standard of balance of probabilities instead of the lower standard to merely raise a reasonable doubt.

[35] We too are mindful of this statement made by the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, a case of drug trafficking where it was said:

> [11] In our respectful view, *Arulpragasan* is authority for the proposition that the test to be applied under the former ss. 173(f) and 180 of the CPC is that the prosecution must establish its case beyond a reasonable doubt before an accused could be called upon to enter his defence. It is not authority for the proposition that it is incumbent for a court to make a finding at the close of the prosecution's case that he was satisfied that the prosecution had proved its case beyond reasonable doubt. The failure by

A the trial court either to make or to record such a finding does not in our is judgment occasion a miscarriage of justice. It is sufficient for the judicial arbiter – be he judge or magistrate – to give his reasons in his written grounds of judgment for requiring an accused to make his defence.

[36] It would appear from the recent decisions of the Federal Court, *albeit* B unreported, that the apex court has now departed from Mohd Radzi Abu Bakar and has gone a step further than what is stated in *Thitapha Charoenchua* (*supra*) to hold that in drug trafficking cases, the trial court must make a positive finding whether it was a case of actual or presumed trafficking and what presumption has been invoked.

C **[37]** We first refer to the decision of the Federal Court in *Caniete Robelyn Mastelero v. Pendakwa Raya* (di dalam Mahkamah Persekutuan di Putrajaya, No. Kes: 05(M)-240-10-2018 (B)). In that case, the same counsel in the present case, Mr Hisyam Teh Poh Teik, had advanced the same argument, namely, that there was a failure on the part of the trial judge at the *prima facie* D ruling, to indicate whether he was calling the defence based on actual trafficking or presumed trafficking. The Federal Court held that as the trial judge had failed to indicate at the end of the prosecution's case as to what basis the appellant was to enter his defence, the appellant has been prejudiced in the preparation of his defence. As such, the Federal Court found that the E conviction for trafficking is not safe. However, as there was enough evidence to convict the appellant of possession, the conviction for trafficking was set aside and substituted to one of possession under s. 12(2) read together with s. 39A(2) of the DDA.

[38] The relevant excerpts of notes of proceedings of the Federal Court in F the Court Management System (CMS) in this case are reproduced below for clarity.

NOTA PROSIDING

Rabu, 13 November 2019
No. Kandungan: 1
G Jenis Prosiding: Pendengaran Rayuan
Perayu: En. Hisyam Teh Poh Teik [Teh Poh Teik & Co.],
Perayu hadir
Peguam Responden: TPR Puan Mangai [Jabatan Peguam Negara, Putrajaya]

H KORAM:

YAA TAN SRI DATUK SERI PANGLIMA DAVID WONG DAK WAH, HBSS
YA DATO' ABANG ISKANDAR BIN ABANG HASHIM, HMP
YA TAN SRI IDRUS BIN HARUN, HMP
I YA DATUK NALLINI PATHMANATHAN, HMP
YA DATUK VERNON ONG LAM KIAT, HMP

Kaedah Pelupusan: Rayuan dibenarkan.

KEPUTUSAN:

Mahkamah:

This is unanimous decision of the Court, In view of the fact that the trial judge had failed to indicate, at the end of the Prosecution's case, as to what basis was the Appellant to enter his defence, we are of the view that the Appellant has been prejudiced in the preparation of the defence. As such we find the conviction on trafficking is not safe. However there are enough evidence to convict her for possession. Accordingly, we set aside the conviction for trafficking and substituted it with one for possession under s. 12(2) read together with s. 39A (2) of the DDA. The Appellant is sentenced to 18 years of imprisonment w.e.f d.o.a 15.11.2013

[Rayuan Perayu dibenarkan. Sabitan di bawah Seksyen 39B(2) ADB 1952 dan hukuman gantung di leher sampai yang dijatuhkan oleh Hakim Mahkamah Tinggi dan disahkan oleh Panel Hakim Mahkamah Rayuan diketepikan dan digantikan dengan sabitan di bawah Seksyen 12(2) ADB 1952 yang boleh dihukum di bawah Seksyen 39A(2) Akta yang sama. Perayu dijatuhkan hukuman penjara 18 tahun dari tarikh ditangkap (15.11.13)].

[39] Premised on this issue, the appellant in *Caniete Robelyn* was acquitted from the trafficking charge and convicted under a lesser offence of possession under s. 12(2) which is punishable under s. 39A(2) of the Act.

[40] The next case is *Rozman bin Ibrahim v. Pendakwa Raya* (Di Dalam Mahkamah Persekutuan di Putrajaya, No. Kes: 05(M)-205-09-2019(B)) where the Federal Court allowed the appeal of the accused based on the same ground. The trafficking charge was reduced to one of possession and the accused instead sentenced to imprisonment of 18 years and whipping of ten strokes.

[41] The relevant excerpts of the notes of proceedings in the Federal Court in the CMS are set out below.

Isnin, 01 November 2021

Jenis Prosiding : Pendengaran Rayuan

Perayu : Pn Suzana Norlihan Alias & Pn Siti Zabedah Kasim

Peguam : Puan Ng Siew Wee
Responden

Minit: Persidangan Mahkamah Persekutuan Malaysia Di Putrajaya Pada 01.11.2021 (Isnin)

MRRS NO: B-05(M)-527-11/2017

MTSA No: 45A-62-06/2014 Panel 2:

Azahar bin Mohamed, HBM
Vernon Ong Lam Kiat, HMP
Zabariah binti Mohd. Yusof, HMP

...

11.00 Pagi – Kes dipanggil semula Mahkamah:

Ini adalah keputusan kami sebulat suara terhadap rayuan pihak perayu Rozman bin Ibrahim. Setelah kami mendengar hujah peguam dan juga hujah Timbalan Pendakwa Raya, hujah-hujah bertulis dah hujah-hujah lisan sebentar tadi dan setelah kami membaca alasan penghakiman Hakim Mahkamah Tinggi dan juga alasan penghakiman Mahkamah Rayuan dan setelah kami meneliti rekod rayuan, kami berpandangan bahawa sabitan dan hukuman mati bagi pengedaran dadah tersebut dibawah Seksyen 39(B) ADB adalah tidak selamat kerana atas 2 faktor.

1. Hakim Mahkamah Tinggi telah membuat dapatan yang becelaru dalam kes ini seperti yang dinyatakan oleh Mahkamah Rayuan dan;

2. Mahkamah Tinggi sebelum memanggil perayu membuat pembelaan tidak menyatakan samaada kes *prima facie* wujud disebabkan presumption possession di Seksyen 37D atau Actual possession dibawah Seksyen 37A ataupun Seksyen 2 ADB. Miscarriage of justice berlaku kerana perayu tidak tahu hala tuju dan beban pembuktian yang dikenakan ke atas beliau sewaktu membuat pembelaan. Kami berpendapat dalam kes keadaan ini Mahkamah Rayuan telah silap menggunakan proviso kepada Seksyen 60.

Walaubagaimanapun berdasarkan keterangan yang terkandung dalam rekod rayuan kami berpuas hati bahawa tertuduh atau perayu memiliki dadah yang berkenaan iaitu 4754gm cannabis pada masa yang berkenaan pada 12.11.2013. Dalam hubungan ini kami bersetuju hujah Timbalan Pendakwa Raya bahawa perayu mempunyai pengetahuan memiliki dadah tersebut pada masa yang berkenaan dan kami bersetuju hujah Timbalan Pendakwa Raya pembelaan innocent carrier seperti yang dihujahkan oleh peguam perayu tidak berasas. Berdasarkan apa yang kami nyatakan sebentar tadi, kami membenarkan rayuan ini setakat ini sahaja. Sabitan dan hukuman mati diketepikan dan digantikan dengan satu kesalahan memiliki cannabis seberat 4754 gm iaitu kesalahan dibawah Seksyen 6 ADB dan dibaca dibawah Seksyen 39A(2) ADB .

Sebelum kami menjatuhkan hukuman, pihak peguam diminta untuk berhujah terhadap mitigasi.

11.06 Pagi – Perayu hujah terhadap hukuman
11.08 Pagi – Responden membalas hujah

Mahkamah:

Perayu didapati bersalah bagi kesalahan memiliki ganja dibawah Seksyen 6, dan perayu dijatuh hukuman penjara selama tempoh 18 bulan dari tarikh tangkap 12.11.2013 dan dirotan sebanyak 10 kali. Kaedah Pelupusan: Rayuan dibenarkan.

Keputusan:

– Permohonan dibenarkan Notis Usui Kandungan 39 Permohonan pemfailan Petisyen Rayuan Tambahan di luar masa benarkan.

– Rayuan perayu dibenarkan sebahagian. Sabitan dibawah Seksyen 39B (1)(a) ADB dketepikan dan digantikan dibawah Sesyen 6 ADB dan sabitan dijatuhkan dibawah Seksyen 39A (2) ADB iaitu perayu dijatuhkan hukuman penjara selama 18 tahun dari tarikh tangkap 12.11.2013 dan 10 kali sebatan rotan.

[42] And more recently is the case of *Low Song Kim v. Pendakwa Raya* (Di Dalam Mahkamah Persekutuan di Putrajaya, No. Kes: 05(M)-227-10-2019(P)) where the Federal Court on 19 September 2022 held that there was merit in the appeal of the accused on the sole ground that there has been a miscarriage of justice occasioned by the failure of the trial court to state whether defence was called on direct or presumed trafficking in relation to the two charges. Likewise, the Federal Court found that there was an overwhelming evidence of possession of the impugned drugs as stated in the two charges. Accordingly, the conviction under s. 39B(2) was set aside and substituted with a conviction under s. 12(2) and punishable under s. 39A(2) for both charges. The appellant was sentenced to 12 years imprisonment for each charge to run concurrently from the date of arrest.

[43] Based on the above decisions of the Federal Court, counsel for the appellant, was correct in submitting that the trial judge had to make himself clear when calling the accused to enter his defence given that there are two separate burdens expected from him. To be clear, we must emphasise that although it may not be incumbent for a court to set out its reasons for deciding to call on an accused to enter upon his defence in a drug trafficking case, it is nonetheless necessary for the trial court to make a finding intimating to the defence if he has to answer a case of actual trafficking or presumed trafficking and, if the latter be the case, to identify is the precise presumption. It is insufficient for a trial court in such cases to merely record the fact that the defence was being called and later in its written judgment to explain which presumption has or has not been relied upon to call for the defence.

[44] As the Court of Appeal has explained in *Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP* [2014] 4 CLJ 406 at 408:

(3) The approach of not electing or making a finding on which presumption was invoked but merely relying on the alternative was most undesirable. The trial judge ought to make the necessary finding of whether there was actual or presumed possession and whether it was presumed or actual trafficking. It reflected the uncertainty of the part of the trial judge. Such finding was important as it impacted the burden placed on the defence. The failure of the trial judge to make a finding as to which presumption was relied upon for possession and trafficking and

A the failure to consider whether the appellant had rebutted the presumption amounted to a misdirection by way of non-direction which had prejudiced the appellant.

[45] The decision in *Seyedalireza* (*supra*) was affirmed by the Federal Court in Mahkamah Rayuan Jenayah 05-53-2014(13) as noted in the Court of B Appeal case of *Ugonna Philip Nwankwo v. PP* [2016] 2 CLJ 247.

[46] Recent Court of Appeal decisions have applied the principle laid down in the recent Federal Court decisions referred to above and followed *Seyadalireza* (*supra*). In *Roman Zolotarov v. PP* [2020] 1 LNS 764, the trial judge had failed to state at the end of the prosecution's case whether the appellant's C defence was called because there was presumed or actual trafficking and at the end of the defence, whether the conviction was based on presumed or actual trafficking. The Court of Appeal held that is there has been a miscarriage of justice which is fatal. In this regard the court said:

D [27] In another Court of Appeal's case of *Abou Sylla v. Public Prosecutor And Another Appeal* [2018] 1 CLJ 46: [2017] 5 MLJ 475 the learned Kamardin Hashim JCA pointed out as follows:

> We have perused through the judgment of the learned trial judge and we agree that there is no indication in the judgment whether the accused was convicted based on actual trafficking or presumed E trafficking. There was no mention at ail by the learned trial judge whether the accused had committed an act of actual trafficking under s. 2 or presumed trafficking under s. 37 (d) of the Act in convicting the accused for an offence of trafficking in the impugned drugs under s. 39B(1)(a) of the Act.
>
> F *We are of the considered view that the failure of the learned trial judge to state whether it was direct or presumed trafficking was a serious misdirection in law. To our mind the misdirection in law had occasioned a miscarriage of justice to the accused person.*

G [28] Likewise for the present appeal there is also no indication by the learned HCJ whether the Appellant is convicted for presumed or actual trafficking. This accordingly is fatal and is a miscarriage of justice to the Appellant. (emphasis added)

[47] In one other recent appeal, the Court of Appeal held as follows in the case of *Masih Perviaz (W/Pakistan) v. PP* [2022] 3 CLJ 230 at pp. 232 to 233

H (2) The trial judge seemed to invoke s. 37(da) of the DDA indirectly. He did not direct his mind whether the element of trafficking was successfully proven by the respondent under which section, either s. 2 or presumption under s. 37(da), before calling the appellant to enter defence. This was prejudicial to the appellant as it was not clear on is which burden the appellant was called to enter defence. If the finding of trafficking was by I direct evidence under s. 2, then the evidential burden on the appellant was to create a reasonable doubt on the prosecution's case, However, if the finding of trafficking was premised on the presumption under s. 37(da),

then there was a higher burden for the appellant to rebut *ie*, on a balance of probabilities. Without the intimation, the appellant would not know what standards he was expected to meet. Had the High Court Judge undertaken a maximum evaluation, the court would have no difficulty to inform the appellant what was the nature of trafficking or whether any presumption had been invoked. Thus, the trial judge had erred when he did not indicate at the prima facie stage whether the appellant's defence was called on direct or presumed trafficking. It was therefore unsafe to convict the appellant for trafficking, (para 59, 60,63 & 65)

[48] It follows from what has been said above that the appellant succeeds on the first issue. It is our respectful view that the omission by the trial judge to indicate, at the *prima facie* ruling, whether the defence was called on direct or presumed trafficking, has occasioned a miscarriage of justice rendering the conviction for trafficking to be unsafe. On that ground alone, we set aside the conviction for trafficking under s. 39B(1)(a) which is punishable under s. 396(2) of the DDA.

Whether The Trial Judge Has Erred In Not Invoking The Presumption Under s. 37(d) Of The Act

[49] In respect of this issue, the prosecution argued that the trial judge was correct in relying on the authority of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 and *Zulfikar Mustaffah v. PP* [2001] 1 SLR 633 in drawing an inference of knowledge on the part of the appellant.

[50] The appellant's counsel on the other hand, citing *Fakhrurrazi Hassan v. PP* [2017] 2 CLJ 125, argued that since there was nothing else such as adverse conduct on the part of the accused to suggest that the accused had the requisite knowledge that there were impugned drugs in the box, the inference of knowledge was misconceived.

[51] The trial judge had drawn an inference of knowledge on the part of the appellant pertaining to the drugs in the box based on the manner the drugs were packed which is not easily visible to anyone and the fact that it was the appellant himself that had retrieved the box from the conveyor belt after taking a flight from Kuala Lumpur.

[52] To our minds, the drawing of such inference was not manifestly unwarranted in the face of the evidence adduced at the trial.

[53] We say so because, firstly, the appellant had opportunity to check the contents of the box as the available evidence suggested that he was the one who retrieved the box from the conveyor belt and that he had flown in together with the box from Kuala Lumpur airport. These are findings of facts made by the learned trial judge which we were loathed to interfere with.

[54] After examining the appeal record, it is pertinent to note that there was also no suggestion from counsel for the appellant that the latter was not the one who packed the box or that the box was handed over by someone else

in Kuala Lumpur to him. Instead, the defence put forward by the appellant was that the box did not belong to him. We are of the view that such a defence is clearly a bare denial as not only is that defence unsupported by any evidence, the appellant's version was clearly contradicted by the luggage tags (exh. P6(a)), (exh. P6(c)) and the boarding pass (exh. P6(b)) found on him which obviously showed a direct link between the appellant and the box in question.

[55] Hence, it can be said that the element of accessibility to the impugned drugs and the opportunity to inspect is invariably established because of his proximity to the box. For this, we rely on *PP v. Abdul Rahman Akif*, *(supra)*, at p. 2, where the Federal Court held that:

> (2) It was not in dispute that the impugned packages were found hidden in the car under the driver's seat and under the front passenger's seat. The respondent was alone in the car at the material time. One other important factor of evidence was that the car had been in his possession for the past seven months prior to his arrest. The irresistible inference that may be drawn in the circumstances was that the respondent all along knew about the drug found in the car. The fact that they were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. From the evidence of PW5 it was clear that little effort was required to uncover what was contained in the packages. Therefore, on the facts and in the circumstances of this case the learned triai judge, properly directed on the law, would have come to the finding that prima facie the respondent had possession of the drug independent of the statutory presumption under s. 37(d) of the Act (see para 24).

[56] Secondly, we agree with the learned trial judge that the fact that the drugs were hidden from view is no ground for saying that inference could not be drawn against the appellant that he had the requisite knowledge. To the contrary, the manner in which the five plastic packets were concealed in the box may furnish evidence of knowledge (see *PP v. Abdul Rahman Akif, supra*, and *Zulfikar Mustaffah v. PP*, *supra*). In *Zulkifar Mustaffah*, the Singapore Court of Appeal said:

> 21 ... In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were is accordingly invited to daw the inference that the appellant had no knowledge of the contents of the bundles.
>
> [22] We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings.

[57] In the present case, the trial judge found that the drugs were wrapped and packed in such a way that they were not easily visible to anyone. Furthermore, the drugs were carefully packed in transparent plastic packages. Three of these plastic packages were kept in the green bag (P 28(b)) whereas two plastic packages were found in the blue bag (exh. P 29(b)) nicely placed in a box (exh. P29(a)). All these items were packed inside the "Chemicare" box (exh. P27) which was later wrapped with a transparent plastic wrapper. We find that the judge was not plainly wrong when he drew an inference of knowledge from this as this is clearly a method employed to avoid detection.

[58] We find support in our view on this in the decision of *Teh Hock Leong v. PP* [2008] 4 CLJ 764 at p. 769 where the Court of Appeal said as follows:

> [8] Turning to the fact of the present instance, we agree with the learned trial judge that the method employed to bring the drugs in question from Thailand into Malaysia was done in a most cunning fashion to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge. Of course it all depends on the facts of each individual case.

[59] Further, the observations of the Federal Court in *PP v. Herlina Purnama Sari* [2016] 1 LNS 1855 on this matter are instructive:

> [39] In this case, it is not in dispute that when the respondent was arrested she was carrying the luggage bag which amongst other things contained the impugned drugs. The respondent was apprehended in the act of carrying from one place to another a large amount of dangerous drugs. It is in evidence that the respondent was unaccompanied by any person when she carried the luggage bag. The luggage bag was registered in the respondent's name when she checked in at the Air Asia check-in-counter. The impugned drugs were found hidden in the two boxes. In fact, the drugs were neatly and securely concealed from view in both the boxes. We are of the view that the manner in which the impugned drugs were concealed in the luggage bag showed that the respondent knew the existence of the drugs there, and evince the intention of and careful planning by the respondent to conceal the impugned drugs to avoid and escape detection (*PP v. Abdul Rahman Akif* [2007] 1 MLRA 568 and *Teh Hock Leong v. PP* [2008] 1 MLRA 548).

[60] We accept these authorities as correctly stating the law. For the above reasons, we are of the opinion that based on the facts and the circumstances of this case, the learned trial judge had properly directed himself on the law and had not erred in coming to the finding that *prima facie*, the appellant had possession of the drug independent of the statutory presumption under s. 37(d) of the DDA.

[61] We have considered the defence of the appellant which we have set out earlier. On the evidence as a whole, we have no hesitation in accepting the finding of the trial judge that the appellant had failed to cast a reasonable doubt in the prosecution's case that he had possession of the dangerous drugs. For that reason, we are of the view that the offence of possession of the drugs has been established by the prosecution beyond reasonable doubt.

[62] Based on the authority of *Caniete Robelyn, Rozman Ibrahim, Low Song Kim, Roman Zolotarov*, and *Masih Perviaz* (*supra*), notwithstanding that the conviction for trafficking under s. 39B(1)(a) is (punishable under s. 39B(1)(a)) of the DDA is set aside, a conviction for possession is warranted. We accordingly substituted the conviction for an offence of possession of dangerous drugs under s. 12(2) and punishable under s. 39A(2) of the DDA. It will be recalled that the defence, in arguing this second point, had submitted and maintained that the conviction for trafficking ought to be set aside and substituted with a conviction for possession.

Whether The Learned Trial Judge Had Erred In Invoking The Presumption Under s. 37(da) Of The Act When The Pre-requisites For Invoking It Had Not Been Satisfied

[63] This is the third ground raised by the defence in submissions. Given that the appellant has succeeded on the first issue resulting in the conviction for trafficking being set aside coupled with the prosecution succeeding on the second issue by establishing beyond reasonable doubt that the appellant had possession of the impugned drugs as stated in the charge, and resulting in a substitution for a conviction for possession, this third ground has been rendered otiose. We are of the view that there is no longer any necessity to deal with this third ground.

Conclusion

[64] It was for the reasons stated above that we had set aside the High Court order of conviction on the trafficking charge and substituted it with a conviction for an offence of possession of dangerous drugs under s. 12(2) and punishable under s. 39A(2) of the DDA. The appeal of the appellant was thus allowed to that extent.

[65] We considered a sentence of imprisonment of 20 years, to take effect from the date of arrest, and whipping of ten strokes, to be appropriate having regard to the facts and circumstances of this case.